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No. 91-207

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

MOHAMMAD ABBAS HASHIM, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
JOHN S. KOPPEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412(d), authorizes the award of attorney's fees for work performed in connection with administrative deportation proceedings conducted by the Immigration and Naturalization Service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 936 F.2d 711. The opinion of the Board of Immigration Appeals (Pet. App. 13a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1991. The petition for a writ of certiorari was filed on July 22, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner prevailed in an administrative deportation proceeding and thereafter sought an award of attorney's fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504 and 28 U.S.C. 2412(d), for

his attorney's work in those proceedings. An immigration judge denied fees (Pet. App. 24a), and the Board of Immigration Appeals affirmed (Pet. App. 13a-23a).

On petitioner's appeal, the court of appeals affirmed, holding that EAJA does not apply to administrative deportation proceedings. Pet. App. 1a-11a. The court noted that "[e]very court, save one, that has addressed the issue" has rejected petitioner's position, and stated its agreement with the majority view (*id.* at 7a-8a).[1]

ARGUMENT

Petitioner correctly observes (Pet. 7) that the issue presented in this petition is the same as the one before the Court in *Ardestani* v. *INS*, cert. granted, No. 90-1141 (Mar. 4, 1991). *Ardestani* has been fully briefed in this Court, and is scheduled for oral argument on October 8, 1991.[2] Accordingly, the in-

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[1] The court of appeals noted that while the Ninth Circuit has held (in *Escobar Ruiz* v. *INS*, 838 F.2d 1020 (1988)) that EAJA applies to INS administrative proceedings since they are similar to those governed by the Administrative Procedure Act, the other circuits that have considered the issue have concluded that EAJA extends only to administrative proceedings which—unlike those conducted by the INS—are subject to the APA. Pet. App. 7a, citing *Hodge* v. *U.S. Dep't of Justice*, 929 F.2d 153 (5th Cir. 1991), petition for cert. pending, No. 91-83; *Full Gospel Portland Church* v. *Thornburgh*, 927 F.2d 628 (D.C. Cir. 1991); *Ardestani* v. *INS*, 904 F.2d 1505 (11th Cir. 1990), cert. granted, No. 90-1141 (Mar. 4, 1991); *Clarke* v. *INS*, 904 F.2d 172 (3d Cir. 1990); and *Owens* v. *Brock*, 860 F.2d 1363 (6th Cir. 1988). The Fourth Circuit has also joined the majority view, concluding that EAJA fees are not available for work performed in INS deportation proceedings. *Escobar* v. *INS*, 935 F.2d 650 (1991).

[2] We are supplying a copy of our brief in *Ardestani* to counsel for petitioner.

stant petition should be held pending the Court's decision in *Ardestani*, and should then be disposed of in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Ardestani* v. *INS*, No. 90-1141, and thereafter disposed of as appropriate in light of that decision.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
JOHN S. KOPPEL
Attorneys

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